RECENT DECISIONS.

AGENCY—CREATION OF THE RELATION BY ESTOPPEL—LIABILITY IN TORT. Where the defendant advertised itself as carrying on the practice of dentistry at its department store, and the plaintiff, owing to the negligent work of the dentist was injured, *held*, the defendant was liable in damages, being estopped from denying the agency of the dentist, who in fact carried on the practice on his own account. *Hannon* v. *Siegel-Cooper Co.*, 60 N. E. 597 (N. Y., June, 1901).

This case is a logical outcome of the doctrine of estoppel as applied in cases of agency involving a contractual relation; as where A, having held B out as his agent, and B, having contracted with C, A is not allowed to deny that B is his agent in an action on the contract. *Tier* v. *Lampson*, 35 Vt. 197 (1862); *Thurber* v. *Anderson*, 88 Ill. 167 (1878). This doctrine holds in cases where the alleged principal is a corporation. *Kiley* v. *Forsee*, 57 Mo. 390 (1874); Ang. & Ames on Corporations, § 284. Cases of a similar nature can rarely arise in the law of torts, as one of the elements of estoppel, an act done by the plaintiff in reliance on defendant's representation, is wanting. But in the principal case, plaintiff, in employing the dentist, relied on the character and business standing of the ostensible principal, thus furnishing the grounds for holding defendant liable.

There is no defense in the fact that the act leading to the injury was beyond the corporate authority. See *Bissel* v. *R. R. Co.*, 22 N. Y. 258 (1860), particularly the opinion of SELDEN, J., at pp. 305 and 306.

BILLS AND NOTES—CERTIFICATES OF DEPOSIT—GIFTS WITHOUT DELIVERY. The plaintiff sued on several certificates of deposit alleged to have been given him by a relative. There had been an assignment in writing, not under seal, but the donor had never delivered the instruments to the plaintiff. *Held*, the plaintiff was entitled to the certificates and might recover. *Cowen* v. *National Bank*, 63 S. W. 532 (Texas, June, 1901).

This decision illustrates the great change which has taken place in the law relating to gifts of choses in action. In England the donee of a bond to whom it has been delivered has been held to have no claim against the obligor. *Edwards* v. *Jones*, 1 M. & C. 226 (1836). This doctrine seems sound on strict common law principles. By an anomaly, recovery is allowed in gifts *causa mortis*. *Snellgrove* v. *Bailey*, 3 Atk. 214 (1744). In the United States the donee is held to have an irrevocable right in all cases where there has been a delivery; *Grover* v. *Grover*, 24 Pick. 261 (Mass., 1837); and a deed of gift without delivery is quite as effectual. *Walker* v. *Crews*, 73 Ala. 412 (1882). In the principal case the decision depends upon a statute providing that the omission or addition of a seal shall not affect the force of an instrument in writing. Texas Rev. St., § 4862.

CARRIERS—LIMITATION OF LIABILITY—SPECIAL CONTRACT. A shipper accepted from defendant railway company without objection a bill of lading containing limitations on common law liability. *Held*, as there was but one contract and one rate open and offered to the shipper, the limitation on liability was without consideration and void. *Illinois Central Ry. Co.* v. *Lancashire Ins. Co.*, 30 So. 43 (Miss., April, 1901).

The common carrier may limit his liability by special agreement; *N. J. S. Nav. Co.* v. *Mer. Bank*, 6 *How.* 244 (U. S. 1848); and there is no well-founded doubt but that the tender by the carrier, and acceptance by the shipper, of a bill of lading creates a contract according to its terms without inquiring whether it has been expressly assented to by the shipper, if there has been no fraud or imposition. *Grace* v. *Adams*, 100 Mass. (1868).

Nor is there any duty on the carrier to offer to carry with his common law liability. If it were the intention of the shipper to hold the carrier as insurer, "*he should have said so*, and have either declined to employ him, or have sued him for his refusal, after tendering a reasonable sum for his services and risk." Hutchinson on Carriers, Chicago, 1891, § 240; *McMillan* v. *Ry. Co.*, 16 Mich. 80 (1837).

Though this contract may be attacked for want of consideration, by showing that maximum rates were charged for limited liability or otherwise, *Bissel* v. *N. Y. C. Ry. Co.*, 25 N. Y. 449 (1862), yet there is a presumption that the contract is for the mutual benefit of the parties and good. Hutchinson on Carriers, § 225; *McMillan* v. *Ry. Co.*, *supra; Huntington* v. *Dinsmore*, 4 Hun 66 (N. Y., 1875).

CONFLICT OF LAWS—PRESUMPTION OF FOREIGN LAW. Plaintiff, injured by a fellow-servant in Illinois, sued in Wisconsin, where statute permitted recovery. *Held*, in the absence of proof to the contrary, the existence of a like statute in Illinois would be presumed. *McCarthy* v. *Whitcomb*, 85 N. W. 707 (Wis., April, 1901).

In all cases the foreign law will be administered as it is proved, or as without proof it may reasonably be presumed, to be. So without proof "courts" of one state will "presume that the general principles of the common law, which we consider to be consonant with wisdom and justice, prevail" in another state. 1 Greenleaf on Evidence, 14th Edition, § 43, n. 1; *Seaward* v. *Columbia Navigation Co.*, 84 N. Y. 48 (1881).

"But no such presumption exists as to the positive statute law of the state. There is generally no probability in point of fact, and there is never any presumption of law, that other states or countries have established . . . the same arbitrary rule, which the domestic legislature has seen fit to enact." *Whitford* v. *Panama Ry. Co.*, 23 N. Y. 465 (1861), *per* DENIO, *J.*; *McDonald* v. *Mallory*, 77 N. Y. 574 (1879); *Murphy* v. *Collins*, 121 Mass. 6 (1877); *Hall* v. *Augustine*, 23 Wis. 383 (1868). In the latter case the same court refused to presume the existence in another state of the Wisconsin statute against usury, on the ground of its penal character. Yet the presumption in the principal case is hardly less violent than would have been that refused in 1868.

CONTRACTS—CHARITABLE SUBSCRIPTIONS—CONSIDERATION—PAROL EVIDENCE. "In consideration of founding a college" defendant gave the plaintiff a promissory note for $500. In an action on the note, wherein the defendant pleaded want of consideration, *held*, between the immediate parties to a note, as in this case, parol evidence may be given of the consideration; and, since this evidence showed that the plaintiff had suffered a detriment at the request and in reliance on the promise of the defendant, the note was valid. *Keuka College* v. *Ray*, 60 N. E. 325 (N. Y., May, 1901).

Although this case may be regarded as showing a readiness on the part of the New York courts to find a consideration in such cases when possible, it nevertheless adheres to the doctrine of *Presbyterian Church* v. *Cooper*, 112 N. Y. 517 (1889), to the effect that so-called subscription contracts are void. For a recent illustration of the contrary doctrine, of which *Sherwin* v. *Fletcher*, 168 Mass. 413 (1897), is the leading case, see *First Universalist Church* v. *Pungs*, 86 N. W. 235 (Mich., May, 1901).

DAMAGES—MENTAL SUFFERING. The plaintiff sued for damages for wilful assault. Because of a defect in the bill of particulars he was precluded from proving physical injury resulting directly from the assault. Evidence was offered as to sudden terror and illness caused thereby, but this the trial Court excluded, dismissing the complaint. *Held*, the exclusion was erroneous, damages for such suffering being recoverable when caused by willful tort. *Williams* v. *Underhill*, 63 App. Div. 224 (N. Y., July, 1901). SEE NOTES, p. 483.

DAMAGES—MENTAL SUFFERING—TELEGRAPH CASES. The Supreme Court of Indiana has affirmed the decision of the Appellate Court and rejected the rule allowing recovery of damages for mental suffering, caused by failure to deliver telegrams, adopted in *Reese* v. *Tel. Co.*, 123 Ind. 294 (1889), and followed in that state during the past twelve years. *Western Union Tel. Co.* v. *Ferguson*, 60 N. E. 675 (May, 1901). The decision of the lower court is noted and commented upon in 1 COLUMBIA LAW REVIEW, 327. SEE NOTES, p. 483.

DOMESTIC RELATIONS—DIVORCE—CONDONATION—REVIVAL. In a suit for absolute divorce brought by the wife it appeared that she had condoned the defendant's adultery. *Held*, subsequent cruel treatment by the husband, though not in itself ground for divorce, revived the condoned offense. *Fisher* v. *Fisher*, 48 Atl. 833 (Md., April, 1901).

In England and in some of our states the question involved in the principal case is dependent upon the construction of statutes. Elsewhere the courts have generally adopted the rule announced here. *Johnson* v. *Johnson*, 14 Wend. 637 (N. Y., 1835). If the effect of condonation could be destroyed only by a repetition of the same offense or by an act of equal gravity, the doctrine of revival would be of but small importance. Forgiveness is treated as having been granted upon the implied condition that, in the future, the other party will observe strictly the duties incident to the marital relation. 2 Greenl. Ev., § 53.

DOMESTIC RELATIONS—DIVORCE—FOREIGN DECREE—DOWER. Plaintiff sued alleged widow of plaintiff's first husband to recover dower in his lands in New York. It appeared that after living together for several years in that state, she had been compelled to leave him because of his cruelty. She acquired a *bona fide* domicile in Massachusetts and procured a decree of absolute divorce on the ground of cruelty. He subsequently remarried in Pennsylvania and died leaving real estate in New York acquired since the time of the judgment for divorce. In this property both women claimed dower rights. *Held*, the decree of divorce being invalid in New York for want of personal service on, or appearance by, the husband, the plaintiff was entitled to dower. *Starbuck* v. *Starbuck*, 64 App. Div. (N. Y. Second Depart., July, 1901). SEE NOTES, p. 485.

DOMESTIC RELATIONS — DIVORCE — FOREIGN DECREE — ESTOPPEL. The petitioner prayed for letters of administration upon the estate of her first husband. After living together in New York for some time subsequent to their marriage, the plaintiff left her husband because of his habitual intoxication, went to Illinois and there secured a decree of absolute divorce upon substituted service of process on the ground above named. Later she returned to New York and married a second time. *Held*, the petition must be dismissed, the plaintiff not being allowed to impeach the judgment which she had herself obtained. *In re Swales*, 60 App. Div. 599 (N. Y., April, 1901). SEE NOTES, p. 485.

DOMESTIC RELATIONS—HUSBAND AND WIFE—TENANCY BY THE ENTIRETY IN PERSONAL PROPERTY. Money deposited in the K. bank, charged to the joint account of husband and wife, was drawn out by the latter, who paid it over to the F. bank, taking a certificate of deposit payable to herself and husband. *Held*, the transaction created an estate by the entirety. *Brewer* v. *Bowersox*, 48 Atl. 1060 (Md., Feb., 1901).

This decision raises a question which has been touched upon by very few cases. Mr. Bishop says that there can be no such estate in personal property, though he cites only one case in support of this view. 1 Law Mar. Women, § 212. Mr. Freeman in his work on Cotenancy (§ 68) takes a different position, but his authorities are not convincing. It is difficult to see how such a tenancy could exist at common law, since the husband took title to all his wife's chattels, and had the right to reduce to possession all her choses in action. It is true that several English cases, following the lead of *Atcheson* v. *Atcheson*, 11 Beav. 485 (1849), hold to the contrary, but these decisions were in equity, where the inter-

ests of married women were jealously guarded. In our country, most of the cases cited as being in accord are those in which the property held was connected with, or derived from, real estate held by the entirety. The importance of distinguishing between such a tenancy and a joint ownership lies in the rule governing the former relation, which forbids each party to alien his interest or to lessen in any way the value of the *res* during the life of the other party.

Where, as in most jurisdictions, the common law disabilities of married women have been abolished by statute, there would seem to be no impediment in the way of the doctrine laid down in the principal case. The same rule has been adopted in Pennsylvania. *In re Parry's Estate*, 188 Pa. St. (1898).

EQUITY—JOINDER OF PARTIES—MULTIPLICITY OF SUITS. A number of property owners joined in a bill to restrain the operation of a neighboring mill at night-time, and respondent moved for dismissal on the ground of misjoinder of parties. *Held*, there was no misjoinder, since all of the parties claimed relief under the same state of facts and the remedy was identical. *Whipple* v. *Guile*, 48 Atl. 935 (R. I., April, 1901).

The bill of peace in the principal case was granted to avoid a multiplicity of suits. All of the parties suffered by the running of the mill and sought the same relief. No question as to misjoinder of parties would have arisen had it not been for the case of *Jones* v. *Del Rio*, 1 Turn. and R. 297 (Eng. 1823), where the parties besides seeking one identical remedy each sought special relief, and so no common decree could be given. In *Hudson* v. *Maddison*, 12 Lim. 416 (Eng., 1841), a case on all fours with the principal case, the decision of the Jones case, *supra*, was wrongly followed. These two decisions were upheld in *Hinchman* v. *R. R. Co.*, 17 N. J. Eq. 75 (1865), although the bill there might have been dismissed on the ground that each plaintiff, in addition to one common remedy, prayed for special relief. *Fogg* v. *R. R. Co.*, 20 Nev. 429 (1890), was decided on similar grounds. In accord with the principal case are: *Gillespie* v. *Forest*, 18 Hun 110 (N. Y. 1879); *Sullivan* v. *Phillips*, 110 Ind. 320 (1887), and *Rowbotham* v. *Jones*, 47 N. J. Eq. 337 (1890).

EQUITY—THE RIGHT OF PRIVACY. The defendants, without authority, used the likeness of the plaintiff in an advertisement and posted 25,000 copies of it in various stores, warehouses and saloons throughout the county, but particularly in the neighborhood of her residence, causing her great humiliation, and ultimately severe nervous illness. *Held*, she is entitled to an injunction and damages. *Robeson* v. *Rochester Folding Box Co., et al.*, 64 App. Div. 30 (N. Y., July, 1901).

Mr. Justice RUMSEY, who wrote the opinion of the Court in this case, supports the conclusion reached by a very able argument: The jurisdiction of equity to protect one from injury is not dependent upon the existence of any right of property; but even if that were not true, there is a right of property in one's own body which the courts will guard, though physical beauty or peculiarity may not in the given case have been used for pecuniary profit.

Whatever may be thought of the attempt made in the second part of this argument to sustain the present holding on grounds well recognized in the older authorities—and certainly the case bears some analogy from this point of view to *Gee* v. *Pritchard*, 2 Swanst. 402 (1818)—the first proposition, that equity will protect rights other than those of property, represents, it is believed, a distinct advance in equitable doctrine, and one which must ultimately win general recognition. The existence of this right of privacy was admitted in *Schuyler* v. *Curtis*, 147 N. Y. 434 (1895), and the Court, in its adverse decision, merely held that there was in fact nothing that could be reasonably called an injury to the plaintiff's feelings. That case is also well distinguished, together with *Atkinson* v. *Doherty*, 121 Mich. 372 (1899), on the ground that the right dies with the person.

The authorities are collected in *Atkinson* v. *Doherty*, *supra*. See

also the article by Samuel D. Warren and Louis D. Brandeis in 4 Harv. L. Rev. 193, and *The N. Y. Law Journal*, Sept. 23 and 24, 1901.

INSURANCE—WAIVER OF CONDITION. A warranty in a policy that a continuous clear space of 100 feet should be maintained between lumber insured and any dry kiln was violated to the alleged knowledge of the company's agent. *Held*, the property being easily movable, if the agent had knowledge of conditions, there was a waiver of the clause only to the extent of allowing a reasonable time to comply with the provisions of the policy. *Hartford Ins. Co.* v. *Post et al.*, 62 S. W. 140 (Texas, 1901).

Under the New York rule, which is generally adopted, the knowledge of an agent to obtain information is the knowledge of the insurer, and facts known at the inception of a policy, which are violations of warranties, the insurer is presumed to waive. Otherwise fraud would be imputed to the insurer. *Van Schoick* v. *Niagara Fire Ins. Co.*, 68 N. Y. 434 (1877). This equitable doctrine imposed by the courts has, so far as is known, never been limited as in the principal case. In warranties looking to the maintenance of certain conditions this introduces a new element which does not seem to be logically involved. The same principle might clearly have been applied in *McGuik* v. *Hartford Fire Ins. Co.*, 56 Conn. 528 (1888), and *Short* v. *Home Ins. Co.*, 90 N. Y. 16 (1883).

PLEADING AND PRACTICE—REMOVAL OF CASES—PREJUDICE. In an action by a citizen of Indiana against a citizen of Indiana and a citizen of Ohio, the defendant, a citizen of Ohio, filed a petition for removal to the Circuit Court. *Held*, there must be diversity of citizenship between all parties, plaintiff and defendant, sufficient to give the Circuit Court original jurisdiction under Section 1 of the Removal Statute. *City of Terre Haute* v. *Evansville, etc., Ry. Co.*, 106 Fed. 545, Feb., 1901. (SEE NOTES *b*. 484).

PROPERTY—CONVERTING REALTY INTO PERSONALTY. Defendant purchased from plaintiff land on which there lay bricks and lumber, which were the remains of a building recently destroyed by fire, and which the plaintiff had evinced no intention to remove. *Held*, the bricks and lumber passed with the land, so that plaintiff could neither remove them from the land after the sale, nor hold the vendee accountable for them. *Guernsey* v. *Phinzy*, 39 S. E. 402 (Ga., July, 1901).

This decision is sound, and illustrates well the fact that intention plays an important part in determining, not only the validity of contracts, but the character of property as well. Whatever has once been realty remains realty until the owner shows an intention, not only to sever it from the land, but also to convert it into personalty. *Brackett* v. *Goddard*, 54 Me. 309 (1866).

PROPERTY—TRESPASS—DAMAGES. Where defendant erected a viaduct 24 feet high and 59 feet wide, and was sued by an abutting owner for damages to the fee of the street as well as injury to easements of light and air, *held*, although defendant owned 24 feet in fee, and had acquired a prescriptive right to maintain a tunnel 61 feet in width, there was a trespass, and plaintiff was entitled to damages caused by the whole structure. *Siegel* v. *N. Y. & H. R. Co.*, 70 N. Y. Sup. 1088 (App. Div., June, 1901).

The majority of the Court based its decision on the ground that the partial trespass rendered the whole structure illegal, and that there was a practical difficulty in apportioning damages. MCLOUGHLIN, J., dissenting, pointed out the fact that, even if there were a trespass in part, that would be no reason for awarding damages as to the whole, as in *Birrell* v. *R. R. Co.*, 41 App. Div. 506 (1899), a case involving similar features. The case of *Conabeer* v. *R. R. Co.*, 156 N. Y. 474 (1898), cited in the principal case, would seem to be controlling. On a similar state of facts, the holding of the Court was that the lands of the abutting owner were burdened by the easements of defendant, and that the increase in the width

of the structure was an incident in the running of the railroad, hence contemplated in the original dealings between the parties.

QUASI CONTRACTS—PLAINTIFF WILLFULLY IN DEFAULT UNDER CONTRACT. Where the plaintiff abandoned without sufficient cause an oral contract to clear lands, *held*, he could recover the value of his services on *quantum meruit*, leaving the defendant to recover damages for the plaintiff's default. *Wanhscaffe* v. *Pontoja*, 63 S. W. 663 (Texas, May, 1901).

On principle, in cases of this kind the plaintiff's willful default should preclude any recovery whatever. *Stark* v. *Parker*, 2 Pick. 267 (Mass., 1824); *Lantry* v. *Parks*, 8 Cow. 63 (N. Y., 1827) *cf. Forbes* v. *Watkins*, 62 S. W. 36 (Tenn., Jan., 1901). But, assuming the right to recover, the proper measure of recovery was not adopted. The true basis, it would seem, is a *quantum meruit*, not to exceed the contract price, less the defendant's damage. *Atkins* v. *Barnstable*, 97 Mass. 428 (1867); *Blood* v. *Wilson*, 141 Mass. 25 (1886). In the principal case the defendant was left to recover his damages from the plaintiff. In this respect the decision is against the great weight of authority, for in almost all jurisdictions, whether a *quantum meruit* or the contract price is adopted as a basis of recovery, the defendant's damage is deducted. *Standard Gaslight Co.* v. *Wood*, 61 Fed. 74 (C. C. A., 1894); *Bedow* v. *Tonkin*, 59 N. W. 222 (S. D., 1894); *Yeats* v. *Ballentine*, 50 Mo. 530 (1874); *Kane* v. *Stone Co.*, 39 Ohio State 1 (1883); *Dermott* v. *Jones*, 2 Wall. 1 (1864).

SALES—CONTRACT TO SELL—REFUSAL TO PURCHASE—RESALE—VALIDITY—DAMAGES. Plaintiff contracted to sell certain personalty to defendant. The latter refused to complete the purchase; whereupon plaintiff gave defendant written notice, and advertised sufficiently that the property was open to inspection, and would be sold at public auction. At the auction the plaintiff, who acted throughout in good faith, bought in the property as highest bidder. In a suit by plaintiff against defendant for the difference between the contract price and the market value, *held*, the sale was valid, the amount obtained by it was lawful evidence of the market value of the property, showing substantial loss by the plaintiff, and, therefore, the direction of a verdict for nominal damages only was error. *Ackerman* v. *Rubens*, 60 N. E. 750 (N. Y., June, 1901).

This decision establishes the doctrine in New York that an unpaid vendor, as agent of his vendee, may, under the circumstances given above, sell to himself. A majority of the Court considered itself forced to this conclusion by *Moore* v. *Potter*, 155 N. Y. 481; but, as pointed out in the dissenting opinion of the present case, the sale in that case was to a third person; at least, the allegation of the plaintiff charging collusion was not sufficiently supported by the evidence on that issue to take the question to the jury.

However this may be, this decision is open to the metaphysical objection that a person cannot contract with himself, and in a violation of the almost universal rule that, for reasons of public policy, "a trustee or agent to sell shall not become himself a purchaser." *Jackson* v. *Van Dalfen*, 5 Johns. 43 (N. Y. 1809); *Michond* v. *Girod*, 4 How. 503 (U. S. 1846); *Eldridge* v. *Walker*, 60 Ill. 230 (1871).

STATUTES—NEW YORK CIVIL CODE—RIGHT TO INTERVENE IN ACTION FOR MONEY JUDGMENT. Under § 452 of the Code of Civil Procedure, providing "that one having an interest in the subject-matter of a suit may have himself made a party by proper amendment," one D, in a suit in which a money judgment was sought, applied to be brought in as a defendant. *Held*, that the Court has no power to compel the plaintiff to bring in a third party as a defendant, the suit being one for a money judgment only, and title to property not being involved. *Bauer* v. *Dewey*, 60 N. E. 30 (N. Y., April, 1901).

The principal case follows the decision of *Chapman* v. *Forbes*, 123 N. Y. 532 (1890), where the Court interpreted § 452 of the Code as being applicable only in cases of an equitable nature, and refused to allow a third party to intervene, as the suit was for a money judgment only.

The part of that section quoted above was held not to apply, as the intervener could not be said to have an interest in the subject-matter, a debt. It had been supposed that the later cases of *Rosenberg* v. *Solomon*, 144 N. Y. 92 (1894), and *Hilton Bridge Co.* v. *N. Y. C. R. R. Co.*, 145 N. Y. 390 (1895), had modified the ruling in the Chapman Case, *supra*. In the Rosenberg Case plaintiff brought an action of replevin, and the intervener claimed title to the subject-matter. His petition was granted on a strict interpretation of § 452, as title to specific property was involved. The Bridge Car Co. Case was an action to foreclose a mechanic's lien, an equitable action ; hence, by granting the petition, the Court merely followed the Chapman Case.

TAXATION—PERSONALTY—SEAT IN THE NEW YORK STOCK EXCHANGE. N. Y. Laws of 1896, c. 908, § 7, reads as follows: "Non-residents of the state doing business in the state, either as principals or partners, shall be taxed on the capital invested in such business as personal property, at the place where such business is carried on, to the same extent as if they were residents of the state." Construing this statute, the Court held a seat in the New York Stock Exchange is not taxable as personal property held by a non-resident, either (1) because it is neither capital invested in business nor personal property within the restricted definition of the tax law, Laws of 1896, c. 908, § 2 (BARTLETT, GRAY and WERNER, J.J.); or (2) because, while it is capital invested in business, it does not come within the definition aforesaid (PARKER, C.J., VANN, MARTIN and CULLEN, JJ.). *People ex rel. Lemmon* v. *Feitner et al.*, 60 N. E. 265 (Apr., 1901).

TORTS—MASTER AND SERVANT—ASSUMPTION OF RISK OF EMPLOYMENT. The plaintiff was employed to run a machine in the defendant's factory. Noticing a defect, he informed the defendant that he would do no more work till repairs were made. The defendant promised to have the defect remedied, and directed the plaintiff to resume work and run the machine as carefully as possible. Plaintiff did so and was injured. *Held*, whether or not the plaintiff reassumed the risk of the employment was a question of fact, and a verdict in his favor will not be disturbed merely because the facts might warrant a contrary inference. *Dempsey* v. *Sawyer*, 49 Atl. 1035 (Me., May, 1901).

When a servant enters into an employment, he is held to assume the risks incidental to such employment. But when, as in the principal case, the servant has notified the master of the increased risk, he has expressly refused to assume such risk. The difficulty arises in determining the intention of the parties on the servant's returning to work at the dangerous machine. The rule would seem to be that within a reasonable time for the repair of the defect the servant has not reassumed the risk, but is acting in reliance on the master's promise to remove the danger; *Illinois Steel Co.* v. *Mann*, 48 N. E. 417 (Ill., 1897) ; but, if such reasonable time has elapsed and the servant continues to work, although no repairs have been made, it shows an intention to assume the risk. *Counsell* v. *Hall*, 145 Mass. 468 (1888).

TORTS—MASTER AND SERVANT—SAFE PLACE FOR WORK. Where the defendant telephone company, under a license, strung its wires upon the poles of another company, he, the defendant, was under a duty to servants to use reasonable care in inspecting the poles, and this notwithstanding the fact that the licensor was under a similar duty to *its* servants. *McGuire* v. *Bell Tel. Co. of Buffalo*, 60 N. E. 433 (N. Y., May, 1901) ; 167 N. Y. 208.

The Court held that the telephone poles were, as a matter of fact, and in spite of the peculiar circumstances of the case, a place of employment which the defendant was bound to use reasonable care to keep in a safe condition. *Pioneer Fireproof Const. Co.* v. *Howell*, 59 N. E. 537 (Ill., 1901). The reporters' head notes to this case, to the effect that the defendant was liable notwithstanding it had no right under its license to inspect the poles, are misleading. A minority of the Court, it is true, did

so interpret the license, but the majority expressly denied that the defendant lacked this right.

TORTS—NEGLIGENCE—PASSENGER ELEVATORS. The owner of a passenger elevator, operated for the convenience of his tenants, is not, as such, a common carrier within the meaning of Mass. Pub. St., c. 73, § 76. *Seaver* v. *Bradley*, 60 N. E. 795 (Mass., June, 1901). See 1 COLUMBIA LAW REVIEW, 398, 413.

TORTS—PUBLIC CHARITY—HOSPITAL'S LIABILITY TO PATIENTS. Plaintiff was injured by negligent nurse in defendant hospital, a public charitable institution. There was no negligence in selecting the nurse. *Held*, plaintiff could not recover. *Powers* v. *Massachusetts Homœopathic Hospital*, 109 Fed. Rep. 294 (C. C. A., First Circuit, May, 1901). SEE NOTES, p. 485.

TORTS—STATUTES—DUTY TO FORWARD MISDELIVERED LETTERS. A defendant who got from the post office a letter, seemingly addressed to him, but which in reality was intended for the plaintiff, and carelessly kept it for several days, thereby causing loss to the plaintiff, was *held* liable in damages. *Cohen* v. *Cohen*, 63 S. W. 544 (Tex., May, 1901).

The case was decided on two grounds: First, by analogy to the telegraph cases, and second, on the ground that the defendant, under Rev. Stat. U. S., § 3892, owed a duty to the plaintiff. The telegraph cases go on the ground that the company is under a liability similar to that of a common carrier, and hence is bound, by common law, to deliver the message. *Western Union Co.* v. *Hargrove*, 36 S. W. 1077 (Tex., 1896). There was no such duty here. Rev. Stat., § 3892, fixes a penalty where a man takes a letter, not belonging to him, with criminal intent, and does not cover the principal case. At most, defendant was under a moral obligation to return the letter, and there is no legal ground on which to hold him liable in damages.

TRUSTS—NOTES INDORSED FOR COLLECTION—RIGHTS OF OWNER. A check was sent to the defendant bank for collection, and paid by cancellation of debts existing between the defendant and the drawee. The defendant failed. *Held*, the owner was not a creditor but *cestui que trust*. *Kansas Bank* v. *State Bank*, 64 Pac. 635 (Kan., April, 1901).

As a general rule, upon the collection of the note, the bank becomes the debtor of the owner, being presumptively entitled to treat the proceeds as his own. *National Bank* v. *Hubbel*, 117 N. Y. 384 (1889); *Phœnix Bank* v. *Risly*, 111 U. S. 125 (1884); *Tinkham* v. *Heyworth*, 31 Ill. 519 (1863). But if there be specific instructions for remittance, the collector becomes a trustee. *People* v. *Bank of Danesville*, 39 Hun. 187 (N. Y., 1886); *Bank* v. *Weems*, 69 Texas 489 (1888). And even though the specific money cannot be pointed out, if the proceeds have come into the collector's hands so as to increase his assets, the old rule as to tracing trust property is so far relaxed as to permit a recovery. *People* v. *Danesville Bank*, *supra*; *People* v. *Rochester Bank*, 96 N. Y. 32 (1884). But a payment of the collector's debts is not such an increase of the collector's assets as to be within the rule. The proceeds must actually form a part of the property on which the trust is sought to be fastened. *Bank* v. *Weems*, *supra*. 2 Perry on Trusts, 5th edition, § 838. On this ground it would seem the principal case is wrong.